

Maine Water Quality Standards Actions and Tribal Context
Informational Briefing for Office of Water Leadership
May 8, 2017

Issue Summary

- In 2014, Maine sued EPA to make approval/disapproval decisions on all backlogged WQS. In 2015 EPA disapproved a number of Maine water quality standards (WQS) because they did not meet Clean Water Act (CWA) requirements. Maine sued EPA over the disapprovals. EPA subsequently finalized a federal promulgation to remedy the disapprovals when Maine did not do so.
- EPA's merit brief is due in August. In February 2017, EPA received two petitions (one from the Maine Governor and the other from three dischargers in Maine) to reconsider the disapprovals and federal promulgation. EPA filed a motion requesting a 90-day stay (which was unopposed by Maine) to allow EPA time to familiarize decision-makers with the rule, litigation, and the petitions.

General Principles of Water Quality Standards Authority in Indian Country

- Under well-established principles of federal Indian law, states generally do not exercise CWA jurisdiction over Indian reservation waters.
- Tribes can apply for Treatment as a State (TAS) and, if approved by EPA, then establish their own WQS on their reservations.
- In the unusual situation where a state can demonstrate authority to establish WQS in Indian country, and EPA agrees, the state can submit WQS to EPA for review under the CWA as applied to Indian country waters.
- Regardless of who has jurisdiction, the CWA requires that water quality criteria must protect the applicable designated uses.

History of Maine WQS Litigation and Disapprovals

- There are four federally recognized Indian Tribes in Maine. The Penobscot and Passamaquoddy are the "southern tribes," and the Houlton Band of Maliseet Indians, and Aroostook Band of Micmacs are the "northern tribes."
- Waters in Indian Lands are a small fraction of all the waters in Maine. (See attached map).
- In 1979 Maine enacted the Maine Implementing Act (MIA) which embodied an agreement reached between the state and two of the four tribes (the Penobscot Nation and the Passamaquoddy Tribe). Congress later ratified MIA in the Maine Indian Claims Settlement Act (MICSA).
- Settlement acts like MICSA bind the federal government in the same way as treaties.

Ex.5 ACP / AWP / DPP

Ex.5 ACP / AWP / DPP

- Between 2004 and 2015, EPA explicitly limited its approvals to state waters outside of Indian lands and refrained from taking any action on the WQS for waters in Indian lands because Maine had not yet affirmatively demonstrated its jurisdiction over tribal waters. Prior to 2004, EPA was silent on the scope of its approval decisions.
- In a 2014 lawsuit, Maine asserted that in the Maine Indian Claims Settlement Act (MICA), Congress granted the state the authority to set WQS in the Tribes' lands. The Tribes disagree with that assertion.
- In a February 2015 written legal opinion from the Solicitor of the U.S. Department of the Interior (DOI) to EPA analyzing whether tribal reserved fishing rights include subsidiary rights to sufficient water quality, DOI ultimately concluded that "fundamental, longstanding tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right."
- After careful review, EPA concluded that under the unique jurisdictional formula Congress established in Maine, the state has jurisdiction to set WQS in the waters on the Tribes' lands.
- However, referring to the DOI legal opinion, EPA concluded that the relevant statutes reserve rights for the Maine tribes to fish for their sustenance in their waters and that those rights are uses of the tribes' waters that must be protected under the CWA.
- EPA thus harmonized the CWA with these reserved rights by interpreting the state's fishing use to mean sustenance fishing for the waters in the reservations and trust lands of all four tribes located in Maine and additionally approved a provision in MIA as an explicit sustenance fishing use in the Penobscot and Passamaquoddy reservations.

Ex.5 ACP / AWP / DPP

- In 2015, EPA took a suite of actions in several increments:
 - Approved the designated uses and almost all of Maine's aquatic life criteria as applied to waters in Indian lands.
 - Disapproved the majority of Maine's human health criteria (HHC) for waters in Indian lands on grounds that the HHC were not adequately protective of the sustenance fishing use because they relied upon the state-wide fish consumption rate (FCR) of 32.4 g/day (approx. 1 oz.).
 - Disapproved six additional WQS for waters in Indian lands (recreational and shellfishing bacteria criteria to protect human health, and a clarification that natural conditions provisions cannot be applied to HHC; mixing zone policy; aquatic life criteria for ammonia, pH, and tidal temperature).
 - Disapproved two WQS state-wide (DO and a provision waiving WQS in event of an oil spill) and one WQS only for Maine waters outside of Indian lands (phenol criteria to protect human health) because they were not based on the latest science and were not protective of applicable designated uses.
- Maine did not move forward to remedy EPA's disapprovals, despite EPA's offers to work with the state.

EPA's Rulemaking:

- Because Maine did not remedy EPA's disapprovals, leaving a gap in protection for Indian country and putting downstream waters at risk, EPA proposed federal WQS for Maine on April 11, 2016, including 96 HHC applicable to tribal waters. The proposal included an Administrator's Determination under the CWA that revised HHC were necessary to protect the sustenance fishing designated use.
- After responding to comments on EPA's proposed rule, in December 2016, EPA promulgated final federal WQS in Maine. EPA promulgated the HHC for tribal waters using a FCR of 286 g/day (approx. 10 oz.), concluding it is a reasonable contemporary sustenance FCR for the tribes based on the anthropological/ historical study of the tribes in Maine.
- EPA's economic analysis for the rule showed that only one discharger may need a more stringent permit limit as a result of EPA's promulgation of the 96 HHC, with an estimated compliance cost of \$28,000 - \$43,000 per year.
- The majority of estimated costs associated with EPA's rule were associated with disinfection requirements for 14 dischargers to comply with year-round recreational criteria (estimated at \$185,000-\$705,000 per year), and for one discharger to comply with the promulgated mixing zone policy (estimated at \$1,000-\$273,000 per year, depending on whether revisions to permit conditions are actually needed as a result of the policy).
- On January 18, 2017, the WQS became effective for CWA purposes.

Litigation

- Maine has challenged our Feb 2015 disapprovals but not the ensuing federal promulgation. Specifically, Maine is challenging EPA's assertion that prior approvals of state standards did not cover Indian Country. Maine also disagrees with EPA's position that we must harmonize WQS under the CWA with the tribes' sustenance fishing rights reserved in the settlement acts, and our approval of those rights as a designated use.
- Maine has agreed not to oppose EPA's request for a 90-day extension (which would also extend the due date for Maine's opening brief from May 15 to August 15).